July 7, 2005

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Communication: CS Docket No. 98-120

Dear Ms. Dortch:

Courtroom Television Network LLC ("Court TV") is writing to voice its opposition to a proposal that it understands is now circulating at the Commission in the above-referenced docket, whereby the must-carry rules would be revised to include an "either-or" option for broadcasters to designate either their analog or their digital signals for must-carry treatment. This "either-or" option would be a substantial departure from the current rules that allow broadcasters to gain must-carry status for digital television only after returning their analog allotments. Because such a departure cannot be justified under the Communications Act's must-carry provisions, the Commission must not alter its prior rulings and must reject the "either-or" framework being considered, notwithstanding broadcaster demands for additional regulatory advantages.

Throughout this proceeding, Court TV has opposed expanding must-carry rights for broadcasters beyond the statutorily required single "primary" video stream because, as the Supreme Court found in narrowly upholding analog must-carry, each carriage preference that broadcasters are accorded makes it "more difficult for cable programmers" like Court TV "to compete for carriage." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997) ("*Turner II*"). *See also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 644, 679 (1994) ("at [its] heart," must-carry is intrinsically unfair because it establishes "preferences" among speakers) (O'Connor, J., concurring in part and dissenting in part). Court TV has thoroughly documented the competitive disadvantage it faces from must-carry preferences, and the corresponding competitive "leg up" that broadcasters receive from must-carry. Court TV Opposition to Petitions for Reconsideration, May 26, 2005, at 7-10; Comments of Court TV, June 11, 2001, at 3-7. Independent networks without broadcast affiliation like Court TV compete with dozens of other cable and broadcast networks for carriage, advertising dollars, and viewers, and must-carry necessarily puts pressure on programmers who lack that regulatory advantage. The must-carry/retransmission-consent scheme relieves broadcasters of the market demands that all non-broadcast programmers face to gain carriage: instead of retransmission consent non-broadcast programs are required to produce compelling programming (which requires researching and developing content that viewers desire and/or identifying audiences underserved by existing fare), and/or must furnish cable operators with significant financial inducements (including both direct payments of per-subscriber launch fees and marketing support, and commercial time in cable network programs permitting cable operators to sell local ads or promote their own services).

The must-carry/retransmission consent scheme also affords broadcasters leverage to launch new cable networks that are guaranteed carriage. Unaffiliated networks like Court TV have lost distribution opportunities and seen their license fee growth limited, while the valuations of Viacom, Disney, Fox, and NBC have increased by tens of billions of dollars. Due to the inequity of the rules, broadcasters and the

cable networks they own have tremendous – and unmatched – market strength. Moreover, since distribution and ratings are critical to advertising revenues, and since ratings depend on viewers, must-carry provides a further unfair advantage to broadcasters by giving them multiple marketing platforms on which to cross-promote their programming.

Even after carriage on a cable system is secured, a pure cable network must constantly promote its product to ensure it maintains enough viewer demand to forestall being replaced by other programmers' offerings, whereas broadcasters never face that risk. With cable operators increasingly offering services above the basic tier in program packages, a cable programmer must convince consumers to purchase the tier that includes its programming, while broadcast channels holding must-carry status are assured placement on the basic tier. In addition, must-carry allows broadcasters to occupy the same market niche as a cable programmer, secure in the knowledge that if a cable distributor finds it is carrying similar channels, it will delete the cable programmer and not the broadcaster – which has regulatory protection. The marketplace can and should work for broadcasters who seek cable carriage for their multicast signals, just as it has for other programmers who are willing to compete; broadcasters should not be relieved of market pressures through additional carriage rights.

In this regard, the current "either-or" proposal is merely a rehash of a policy option the Commission floated under its 1998 Notice of Proposed Rulemaking in this docket, *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, 13 FCC Rcd. 15092, (1998), and rejected in its decision in the first Report and Order, 16 FCC Rcd. 2598, 2604-05 (2001) ("*First R&O*"), which was reaffirmed in substantial part just a few months ago. 20 FCC Rcd. 4516 (2005) ("*Second R&O*"). Indeed, "either-or" is little more than the dual carriage requirement that has now twice been rejected – unanimously, in the *Second R&O* – only it now simply bears a different name. This is so because broadcasters that elect must-carry for their digital signals or stations would reach only those cable homes that have digital set-top boxes (fewer than half do). This in turn would require cable operators to downconvert the signal for their analog subscribers, with the ultimate consequence that broadcasters would obtain carriage on both the cable system's digital and analog tiers. Given this effect, nothing has changed in the few months since the *Second R&O* affirmed the rejection of dual carriage, or since the *First R&O* did so originally, which supports reinvigorating dual carriage in the form of an "either-or" rule.

In any event, dual carriage, "either-or," or any other manifestation of such a framework, is not authorized by the statutory must-carry mandate, and accordingly is inconsistent with the Act's goals and would not survive judicial review. The Supreme Court was quite clear in *Turner* that must-carry rules are valid only insofar as they advance the objectives that Congress set forth, and the *Turner* Court relied upon, to support must-carry, specifically, preserving free over-the-air television, ensuring source diversity, and promoting fair competition. *Turner II*, 520 U.S. at 190-91 (refusing to consider rationales "inconsistent with Congress' stated interests in enacting must carry"). Dual carriage and "either-or" rules would work at cross-purposes with these objectives, because they would benefit only those broadcasters that have the most market power, *i.e.*, those that can leverage the demand for their programming into multiple cable system slots, and would harm the weaker broadcasters must-carry was designed to benefit. *See id*. at 191-92. This failure to advance must-carry's statutory goals also would undermine any chance of the "either-or" approach surviving First Amendment scrutiny under *Turner*, particularly given the well-established requirement that the FCC must implement the Communications Act in a manner that avoids

serious First Amendment questions. *See, e.g., U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999).

Any suggestion that, notwithstanding these shortcomings, "either-or" should be adopted in the interest of advancing the digital transition would not save it from invalidation. As a threshold matter, given the incentives outlined above, it would serve only to sustain a vestige of analog service rather than encouraging broadcasters and consumers to embrace the transition. That practical drawback aside, though, advancing the digital transition was not a statutory objective advanced by Congress or approved by the Supreme Court for must-carry; accordingly, it cannot serve as a legitimate basis for new must-carry obligations.

For all the foregoing reasons, the Commission should reject the "either-or" option.

Respectfully submitted,

COURTROOM TELEVISION NETWORK LLC

/s/
Douglas P. Jacobs
Executive Vice President &
General Counsel

/s/
Nancy R. Alpert
Senior Vice President,
Legal and Business Affairs &
Deputy General Counsel

July 7, 2005

cc: Chairman Kevin J. Martin
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein